APPENDIX 1.

New Constitution of Louisiana Adopted June 18, 1921, Article VII, Sec. 25:

> "Each Court of Appeal shall have power to certify to the Supreme Court any question of law arising in any cause pending before it concerning which, for its proper decision, it desires the instruction of that court; and thereupon the Supreme Court may either give its instruction on the question certified to it, which shall be binding upon the Court of Appeal in such case, or it may require that the whole record be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been on appeal directly to the Supreme Court."

APPENDIX 2.

Respondents' counsel contend (Brief, page 10):

> "It is settled law in Louisiana that one entering a fog * * * must stop until sure of his way, or, if he drives into it, he must proceed at such a speed as that he can stop the car in the distance within which he can see objects in his way."

As sustaining this rule, counsel cite:

(1) *O'Rourke* v. *McConaughey,* (Ct. Appeals La., Orleans, 1934), 157 So. 598, which was distinguished *supra;* also in Petition for Certiorari, pages 25, 62. In addition, this was a case wherein the doctrine of the last clear chance was applied. The Court said:

> "Plaintiff's negligence having expended itself, his car being stationary and having been thus for several minutes before the collision, defendant only was in a position to avoid the impact. His was the last clear chance. * * *
>
> "While under certain circumstances creating an emergency the rule may be different, there is little or no excuse for running into a stationary object, par-

> ticularly one which has been stationary for some time before the collision, whether it be daylight or dark, clear or foggy, misty or rainy."

But compare the *Gaiennie Case, supra,* in the Supreme Court.

(2) *Raziano* v. *Trauth,* (La. Ct. App., Orleans, 1931) 131 So. 212. Distinguished, Petition, page 64.

"The sole question is whether defendant had the last clear chance of avoiding the accident." This was not a decision of the Supreme Court.

(3) *Penton* v. *Fisher,* (Ct. App. La., 1st Cir., 1934), 155 So. 35.

This case assumed to follow *Woodley & Collins* v. *Schusters' Wholesale Produce Co.,* 170 La. 527, 128 So. 469, 470, wherein the Court said (in the *Penton Case*):

> "Penton was driving about as slow as he could, and seems to have been on the lookout for danger ahead, but an automobile suddenly appeared in the darkness ahead on the wrong side of the road without lights and diagonally across the road, apparently blocking his way, was something which he had no reason to expect and could not discover any sooner than he did."

A recovery was thus allowed.

Thus contradicting the declaration in the *O'Rourke Case* as to the presence of other cars on the highway, being in direct conflict thereasto.

(4) *King* v. *Jamstremski,* (Ct. App. La., 1st Cir.) 6 La. App. 355, 357, note, 73 A. L. R. 1026.

This, too, was a Court of Appeals opinion, not the Supreme Court, and in that case plaintiff's son, who sued, was on the wrong side of the road, driving without lights, which was held to be contributory negligence barring recovery from defendant, likewise guilty of negligence.

(5) *Lapeze* v. *O'Keefe,* (Ct. App. La., Orleans) (1935), 158 So. 36.

Distinguished and commented on, Petition, pages 32, 66.

This was a case wherein a guest sued the driver for a collision. The driver was going about 35 miles an hour and in a fog "lost his sense of direction, and the right wheel of the car slipped off of the surfaced roadway onto the graveled shoulder of the road, which was several inches lower than the paved portion. He attempted to swing the car back on the road, but the right wheels caught on the side of the paved roadway. O'Keefe attempted to step on the brakes, but missed them, and the car rolled down the embankment and collided with a tree."

In the *Lapeze Case* reference was made to Ward *v.* Donahue, 8 La. App. 335 (La. Ct. App., 2nd Cir.). There, it was said:

> "It has been repeatedly held that the driver of an automobile in proceeding along a city street when he is blinded by the lights of another car or blinded by fog, smoke or dust, or when the windshield is so covered with rain water that his view ahead is obstructed, is guilty of negligence, and that it is his duty to look around the end of the windshield if that is the only way in which he can proceed in safety, and in extreme cases to stop."

(6) *Hutchinson* v. *James,* (1935; Ct. App. La., Orleans) 160 So. 447.

Distinguished in Petition, page 66.

This likewise was a Court of Appeals decision. Therein plaintiff's automobile struck defendant's truck parked in a dense fog, and was stationary but a few seconds on the extreme right of the highway with the right wheels resting on the shoulder. A platform protruded beyond the rear wheels and the paint was discolored and worn from use, affecting "its visibility". Plaintiff was traveling about 15 miles an hour, but finding the fog very thick and unable to see more than three feet in front of his automobile was going about eight miles an hour when it struck the truck. Defendant's driver got out to look for vehicles, and in that case, the Court of Appeals misinterpreted the case of *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, as

later construed by the Supreme Court in the *Gaiennie Case.* Respondent cannot show on this record, or at least the jury could have properly found, that Slade could have stopped within the line of his vision, and that in colliding, he did not suffer any injuries whatever from the front, but to the rear the fifth wheel gave way from crystallization or other cause and thereby caused his death. The extent of the strain placed upon the Fifth wheel, defendant did not explain or attempt to explain.

(7) *Rector* v. *Allied Van Lines,* (1940, La. Ct. App., 2d Cir.), 198 So. 516.

Distinguished, Petition, page 65.

This, also, was a Court of Appeals decision, wherein plaintiffs, or their representatives were parked in a Chevrolet car without lights and this is a case wherein the last clear chance was applied. The Court of Appeals of the Second Circuit referred to *Hudson* v. *Provensano,* 149 So. 240, wherein that court indicated that contributory negligence of those thus situated would have barred, but as to what constitutes contributory negligence under the Louisiana statute there is no hard and fast rule and each case must be determined on its own merit.

(8) *Strauss & Son* v. *Childers,* (1933, La. Ct. App. 2d Cir.) 147 So. 536, is likewise a Court of Appeals decision, containing conflicts wherefor rectification was essential.

(9) *Castille* v. *Richard,* (1924) 157 La. 274, 102 So. 398.

See Petition, pages 16, 25, 64.

(10) *Dominick* v. *Haynes Bros.,* (1930; Ct. App. La., 2d Cir.) 127 So. 31.

See Petition, page 64.

(11) *Campbell* v. *Texas & P. Ry. Co.,* (1938; Ct. App. La., 2d Cir.) 339.

This case is appropriately stated in the syllabus:

> "Where motorist, to avoid danger from fire which threatened filling station where he was, drove away

from the filling station on a section of the highway which was obscured by smoke from the fire, and because of the smoke was injured by collision with another car, his contributory negligence barred recovery either from the railroad which was responsible for the fire or from the other motorist, where plaintiff motorist could have driven onto an unobscured section of the highway, or onto a side road."

(12) *Pepper* v. *Walsworth,* (La. Ct. App. 2d Cir.) 6 La. App. 610. The third Syllabus thereof is:

"When the driver of an automobile on a public highway at night finds himself blinded by the bright lights of an approaching car, or if at any time his view of the road is obstructed by dust, smoke or fog, it is his duty to bring his vehicle under such control that he will be able to stop it at once in case of emergency, and in some cases to stop his car until the obstruction to his view is cleared."

(13) *Woodley & Collins* v. *Schusters' Wholesale Produce Co., supra,* especially as paraphrased in the *Gaiennie Case.*

(14) *Safety Tire Service* v. *Murov,* (La. Ct. App., 2d Cir., 1932), 140 So. 879.

Therein, it was said:

"Plaintiff's driver was traveling at a rate of speed of thirty to thirty-five miles per hour just prior to meeting the car going north, and how much he reduced his speed is not shown. It is contended by defendant that he should have reduced his speed upon being blinded by the lights of the approaching car to such a speed as to have been able to stop immediately, if faced with an emergency.

"This court has adopted that principle of law in the case of Woodley & Collins *v.* Schuster's Wholesale Grocery Co., 12 La. App. 467, 124 So. 559, affirmed by the Supreme Court in 170 La. 527, 128 So. 469."

And the opinion concluded thus:

"Plaintiff relies on the case of Hanno *v.* Motor Freight Lines, Inc., decided by the First Circuit, Court

of Appeal, and reported in 17 La. App. 62, 134 So. 317. The opinion of the majority of the court in that case is directly in conflict with the ruling of this court and the Supreme Court of the state in the case above cited. The dissenting opinion of Judge Elliott is more in conformity with what we consider the jurisprudence of this state, and a universal ruling, with few exceptions."

So that, it is perfectly obvious that the decision in the *Gaiennie Case* was essential to straighten out this confusion.

(15) *Harper* v. *Holmes*, (Ct. App. La., 2d Cir., 1939) 189 So. 465.

There an automobile collided with the rear end of a wagon wherein the plaintiffs were, when defendant, operating the automobile had been blinded by oncoming lights. Judgment for plaintiff was sustained because:

"Since the defendant was blinded, the fact that plaintiffs' wagon was not properly equipped with lights required by law passes out of the case as a sound defense. It could not have been a proximate cause of the collision, for the reason that when one is blinded by the lights of another car he cannot see either objects or lights and if plaintiffs' wagon had been equipped with lights as specified by law, the accident would have happened just the same. We, therefore, conclude that the lower court was correct in sustaining the plea of contributory negligence."

(16) *Maggio* v. *Bradford Motor Express*, (1937; Ct. App. La., Orleans) 171 So. 859.

Distinguished, Petition, page 65. Herein, the Court of Appeals declared the fact that ones vision is not clear places upon him a greater duty of care than would exist under ordinary circumstances.

(17) *Mansur* v. *Abraham*, (Ct. App. La., 1st Cir., 1935) 164 So. 418. Therein was a quotation from the *O'Rourke Case* thus:

"From the foregoing jurisprudence of this state the

general rule emerges, *by the weight of authority,* that the operator of a motor vehicle on a public highway shall have his car under such control that he can bring it to a complete stop within the range of his vision or the penetration of his headlights,"

whereasto thus even the *O'Rourke Case* admits there is a contrariety and assumes to decide on the strength of the weight.

(18) *Arbo* v. *Schulze,* (Ct. App. La., Orleans) (1937) 173 So. 560, involved a question of pleading wherein recovery was denied because:

"No matter how it was parked or of what material constructed, the truck was far enough away when he saw it to enable plaintiff to avoid striking it."

(19) *Russo* v. *Aucoin* (Ct. App. La., 1st Cir., 1942), 7 So. 2d 744.

Distinguished, Petition, page 66, and, in general, was a case of the last clear chance.

(20) *Mouton* v. *Talbot & Son* (1935; Ct. App. La., 1st Cir.), 161 So. 899. Therein, the syllabus accurately reflects the holding:

"Motorist, driving in rain at night with dim lights at about 25 miles an hour and failing to slow down or stop on reaching guard, stationed behind disabled truck without rear lights burning to warn traffic while owner thereof was attempting to remove it from highway, held guilty of negligence proximately causing collision with rear end of truck, so as to bar his recovery of resulting damages from owner (Act No. 21 of 1932, Sec. 3, rules 4 (a), 15, 15 (c)."

(21) *Becker* v. *Mattel* (1936, Ct. App. La., Orleans), 165 So. 474.

Therein, the second syllabus is:

"Motorist driving on dark misty night at rate of twenty miles per hour while headlights of approaching

automobile interfered with his vision, and passing within eight inches of parked automobile around which three boys were standing, held guilty of negligence and liable for injuries to boy who was struck while standing at side of parked automobile."

(22) *Penton* v. *Sears, Roebuck & Co.* (1941; Ct. App. La., 1st Cir.), 4 So. 2d 547.

This was distinguished Petition, page 66. Therein, it was said:

"When there is any condition in the weather which affects visibility, such as fog, rain, or smoke, it is the duty of the driver of a motor vehicle to take extra precautions to meet such unusual circumstances. 1 Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed., p. 501, Sec. 689. The evidence in this case does not show, however, that there was any serious impairment of Penton's vision as it seems that he was able to see a sufficient distance, as already stated, for him to be aware of the presence of the truck in his lane of traffic and avoid running into it had he been going at a proper speed and keeping a proper lookout, with his car under control."

(23) In *Louisiana Power & Light Co.* v. *Saia,* 188 La. 358 (1937), 177 So. 238, the question arose on an exception of no cause of action, and it was there said:

"It is our opinion that the plaintiff's petition affirmatively alleges facts showing that its employee was guilty of contributory negligence, because the single and solitary reason assigned for not seeing or discovering the presence of the truck and trailer was that 'it was quite dark.' Under these circumstances, the defendants have a right to raise the issue of contributory negligence by exceptions of no right or cause of action, and this is particularly true where the plaintiff was not denied the right to amend its petition to show additional reasons why its employee failed to discern the unlighted parked vehicle."

Had there been lights or fog caused by defendant, then, as shown in the *Gaiennie Case,* it would have been a question for the jury.

(24) *Pollet* v. *Robinson Lumber* Co. (Ct. App. La., Orleans), 123 So. 155.

Therein, the second syllabus accurately states the rule:

> "Even if it be held negligence to drive along a highway after dark without a light a team of mules unhitched to a vehicle, it was contributory negligence, constituting proximate cause of collision with them of an automobile, for motorist to fail to have his car under such control as would have permitted his stopping within the distance illuminated by his lights, but for which the accident could not have occurred."

Therefore, the declaration in the *Gaiennie Case* in the Court of Appeals that there was, as to contributory negligence, want of certainty * * * conflict * * * is manifestly borne out by an examination of the facts in these several cases, and, with deference, the decisions as to contributory negligence have not been consistent and the *Gaiennie Case* was essential to bring about rectification and certainty.